IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 12508 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG
HON'BLE MR.JUSTICE RAVI R.TRIPATHI

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

CHELABHAI KALUBHAI UPLANA (PATEL) - Petitioner(s)

Versus

DEPUTY COLLECTOR (MIDDAY MEALSSCHEME) AND ELECTION OFFICER & 2 - Respondent(s)

==========

Appearance :

MR TUSHAR MEHTA FOR MR KETAN D SHAH for Petitioner

MS.PAUROMI SHETH, AGP for Respondent No(s).: 1.
DS AFF.NOT FILED (R) for Respondent No(s).: 1.
MR SN THAKKAR for Respondent No. 2.
RULE SERVED BY DS for Respondent No(s).: 3.
MR PRAKASH K JANI for Respondent No(s).: 3.
==========

CORAM :HONOURABLE MR.JUSTICE R.S.GARG
HON'BLE MR.JUSTICE RAVI R.TRIPATHI

Date : 13/07/2005

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.S.GARG)

1. By this writ application under Article 226 of the Constitution of India, the petitioner challenges the order dated 22.6.2005 (Annexure:A) passed by the Election Officer-cum-Deputy Collector (Mid Day Meals), Banaskantha, Palanpur, under which the name of the petitioner, which was included in the provisional list of the voters was ordered to be deleted. It is submitted in the writ application that the petitioner is a primary member of Adrana Dudh Utpadak Sahkari Mandali Ltd. (hereinafter to be referred to as "the primary society"). It is submitted by the petitioner that one of the member of the Managing Committee namely, Patel Karsanbhai Daljibhai tendered his resignation from the post of the member of the Managing Committee on 25th October, 2004, a meeting of the Managing Committee of the said Society was convened on 29th October, 2004 to consider the said resignation. In the said meeting Resolution No.6 was taken to accept the resignation. As a consequence, a vacancy was caused and as general elections of the Managing Committee were to take place after some time, Managing Committee in its meeting on 5th November, 2004 resolved for appointment/co-option of the petitioner as a member of the Managing Committee. His submission is that immediately thereafter, the

petitioner assumed charge and continued to be a member of the Managing Committee. His further submission is that the general body meeting was convened on 24th May, 2005 for purposes of electing the new Managing Committee, the elections were held in the said meting and the petitioner came to be elected along with other persons as member of the Managing Committee for a tenure of three years i.e., for the period between 2005-06 to 2007-08.

2. It is submitted by the petitioner that challenging the appointment/co-option of the petitioner, one Patel Galbabhai Raisangbhai (respondent no.3) filed Lavad Suit No. 289 of 2005 before the Member, Board of Nominee, and also prayed for ad-interim injunction. The learned Nominee by its order dated 14th June, 2005 granted interim injunction to the effect that the resolution dated 5.11.2004 should not be given any effect. Against the said order, the present petitioner filed Revision No. 198 of 2005 before the Revisional Tribunal. The Tribunal allowed the revision by its order dated 20th June, 2005 and vacated the injunction, but however, directed the learned Member, Board of Nominee that after giving due opportunity of hearing and too lead evidence, the learned Nominee should dispose of the matter finally within a period of

three months from the date of appearance of the parties.

3. It is submitted that after the petitioner was appointed/co-opted as member of the Managing Committee of the primary society in accordance with the Rules, name of the petitioner was referred to the Apex Society namely, Banaskantha District Cooperative Milk Producers' Union Limited (Respondent No.2) for its inclusion in the Voters' List. His further submission is that the petitioner's name was included in the preliminary list of voters and if the same could continue in the Voters' List, the petitioner could contest election or at least, could cast his vote. It is also submitted that in accordance with Rule-6 of the Gujarat Specified Cooperative Societies Elections to Committee Rules, 1982, objections were invited by the Election Officer, in response to which, the respondent no.3 submitted his written objections. Though the parties have not filed th copy of the objections, but the Election Officer, who had passed the impugned order has produced the copy of the said objections for our perusal. We will refer to the objections at a later stage. The further submission is that the Election Officer upheld the objections and directed deletion of the name of the petitioner from the Voters' List. Grievance of the

petitioner is that the order passed by the Deputy Collector/Election Officer is per se illegal, is in fact, to help and oblige the objector and shows absolute and utter non-application of mind and also shows that even in absence of any material, he had passed such order violating every norm known to the law.

4. In reply to the petition, the Election Officer has filed his personal affidavit. He has submitted that the petitioner has come out with half truth. His submissions are that the action taken in fact, was absolutely correct, he was also justified in not including the name of the petitioner in the Voters' List as the matter relating to the co-option of the petitioner was pending consideration in the Lavad Suit and he was entitled to delete the name of the petitioner in view of the authority conferred upon him. He has also observed that in light of the reported and unreported judgments of this Court, he was justified in observing that no cooperative society has authority to fill in the vacancy either by co-opting, appointing or nominating any person. His further statement in the affidavit is that the petitioner's co-option was not approved in the general body and as such, he had no authority to take part in the elections. It is also

submitted by him that though injunction order was vacated by the Revisional Tribunal, but the matter is yet pending and has not been disposed of, therefore, he was justified in granting prayer of the objector. He has also referred to Rule 28-(d) to contend that the Rule does not specifically refer to co-opted members therefore a co-opted member of the primary society would not be entitled to be included in the Voters' List.

5. Respondent No.3 has not challenged the material submissions made by the petitioner but in his affidavit dated 11th July, 2005, has submitted, inter alia, that the petitioner was co-opted on 5th November, 2004 in contravention of Bye-law No.30(13) of the Primary Cooperative Society. It is submitted by him that the petitioner was not qualified to be a member of the Managing Committee as he had not supplied 700 liters milk or in the alternative, did not supply the milk for minimum period of 180 days in the preceding year. He has also submitted that the petitioner started supplying milk from 1st September, 2004, therefore, as on 31st March, 2005, the petitioner could not be said to be qualified to be a member of the Managing Committee.

6. Learned counsel for the petitioner, in support of the

petition submitted that a perusal of the order passed by the Election Officer would make it clear that he was relying upon the letter dated 3.6.2005 to hold that co-option of the petitioner was not approved in the general body meeting, therefore, he has lost his right.

7. The Election Officer has observed that the Board of Nominee, by its order dated 14.6.2005 issued an order that the petitioner could not be co-opted, therefore, on 19.4.2005, the petitioner's name could not be referred. Even at this stage, we must express our shock and surprise to the understanding of the Election Officer. We asked Ms. Sheth to seek instructions from the Election Officer, who is present in the Court, to justify these observations. It is to be seen that the name of the petitioner was forwarded by the Primary Cooperative Society on 19.4.2005 and on that day, nobody knew that some dispute would be filed on some future date and on some future date, the Board of Nominee would issue an order of injunction.

8. Though alive to the order passed by the Revisional Tribunal on 20th June, 2005, whereunder injunction order was vacated, the Election Officer still says that the matter was remitted to the Board of Nominee for its final disposal within a period of three months and as the matter

is still pending and is sub-judice, the petitioner's name could not included. The Election Officer has observed that no person can be co-opted to the Managing Committee, therefore also, the petitioner could not be co-opted as member of the Managing Committee.

9. Mr. Tushar Mehta, learned counsel for the petitioner submits that the judgment of this Court reported in **2004 (1) GLR 310** on which the respondents are placing reliance is not in relation to the Primary Cooperative Society, but is referring to Section 74-C(3) of the Gujarat Cooperative Societies Act, 1961, which governs the rights and authorities of the specified cooperative societies. His submission is that co-option is not foreign to the Managing Committee and from Section 74-B, it would clearly appear that in case, reserved seats cannot be filled by election, then, reserved seats can be filled by appointment/co-option. His further submission is that co-option under the bye-laws of the Society is not required to be approved in the general body meeting and the respondent no.3, to mislead the Election Officer and to create a state of confusion submitted the certificate dated 3.6.2005 to obtain a favourable order. His submission is that the certificate dated 3.6.2005 has been

drafted to convey a sense that co-option dated 5.11.2005 has not been approved by the general body and therefore, it must be presumed that co-option has come to an end. His submission is that co-option could continue only up to the election of the Managing Committee and as on 24.5.2005, general body had elected a Managing Committee, there was no reason to consider the question of co-option. His submission is that the certificate, in fact, was obtained to play fraud upon the Election Officer. His further submission is that the Election Officer, without even looking to the Bye-laws of the Primary Cooperative Society, simply referred to the certificate and without application of his mind, observed that the petitioner's co-option was not approved. The submission is that a document of present nature could not be relied upon unless foundational facts were available. His further submission is that for the primary level cooperative societies, their Managing Committees are to be constituted in accordance with Rule 5(2) of the Gujarat Cooperative Societies Rules, 1965, under the bye-laws to be framed by them from time to time. Referring to Clause-(2) of Rule 5, he submits that a Primary Cooperative Society is entitled to make bye-laws relating to its constitution and the election. His

submission is that in accordance with the powers conferred under Rule-5 of the Rules, the Primary Cooperative Society has framed bye-laws and in accordance with law. Bye-law No.35 provides that in case of a vacancy occasioning on death or for any other reason, Managing Committee would be entitled to appoint any person to fill in the vacancy. His further submission is that the present is a case where fraud has been played upon the Statute and the Election Officer, for the reasons best known to him, not only supported the respondent no.3 in upholding the objections, but is also supporting the respondent no.3 even in these proceedings.

10. Ms. Sheth, learned counsel for the Election Officer, when was confronted with this fact, sought further instructions from the Election Officer. It is submitted by her that there is no reference to the letter dated 3.6.2005 in the body of the objections, she however submits that once objections were filed and the documents were appended to it, the Election Officer was justified in considering every objection. When we asked her that whether the Election Officer made any inquiry into the bye-laws of the Primary Cooperative Society that whether the co-option was required to be approved in the general

body, after seeking instructions, she submitted that the Election Officer did not seek any instructions. When we asked her to justify the stand taken by the Election Officer that though injunction had been vacated, but as the matter is still sub-judice, the petitioner would not be entitled to be registered as a voter, she submitted that the approach of the Election Officer was patently illegal. When we inquired from her that the judgment of this Court reported in **2004 (1) GLR 310 in the matter of Antakampa Milk Producers' Co-op. Society Ltd. Vs. Sabarkantha District Co-op. Milk Producers' Union Ltd., if** was simply referring to the specified societies and Rule-5 of the Rules provides for making of the bye-laws for constitution and conduction of the election etc., how could the said judgment be applied to the facts of the present case, she submitted that the Election Officer committed a mistake in not understanding the distinction between a specified society referred in Section 74-C and an ordinary primary level cooperative society. She however submitted that present is a case where the Election Officer did not act mala fide, but was exercising the rights and authority conferred upon him under the law.

11.Mr. P.K. Jani, learned counsel for the respondent no.3

submitted that the Election Officer was absolutely justified in not including the name of the petitioner in the final list of voters. His submission is that the petitioner could be appointed a member of the Managing Committee of the Primary Cooperative Society provided he fulfilled the requirement of bye-law no.13 that within one cooperative year, the member had supplied milk for 180 days or had supplied 700 litres milk. His submission is that on 5.11.2004, the petitioner was not fulfilling the said conditions, because, he had not supplied milk for 180 days by that time nor he had supplied 700 litres milk from the date of the supply till the date of his co-option, therefore, he could not be co-opted and if he could not be co-opted, his name could not be forwarded and as such the Election Officer was absolutely justified in not including the name of the petitioner.

12. At this stage, we asked Mr. Jani that the question raised by him is not the ground on which the petitioner's name was rejected by the Election Officer, then, how could such argument be raised in support of the order passed by the Election Officer, to this, Mr. Jani submitted that the respondent no.3 is free to support the order on any other ground on the material available to the respondent no.3.

It is to be seen that in the counter affidavit filed by respondent no.3, but for this ground, no other question has been raised.

13. We asked Mr. Jani to go through the objections filed by respondent no.3 and inform us that whether objector had taken objection that the petitioner's co-option approved on 5.11.2004 and was not approved in the general body meeting. We also asked him that in accordance with the bye-laws of the Primary Cooperative Society, whether co-option was required to be approved, Mr. Jani submitted that under the bye-laws of the primary level cooperative society, authority to co-opt/appoint vested in the Managing Committee and the resolution passed by the Managing Committee was not required to be approved by the general body. He also admitted that in the meeting dated 24th May, 2005, the petitioner was elected as member of the Managing Committee. When we asked him that why such a certificate that co-option was not approved in the general body meting was filed before the Election Officer, most innocuous reply came from Mr. Jani that the respondent no.3 being an innocent man and ignorant of law thought that such document should have been produced. Mr. Jani, however, submits that present is a case where election

process has begun and at this stage, this Court should not interfere. When we asked Mr. Jani that whether judgment of this Court in the matter of Antakampa Milk Producers' Co-op. Society Ltd., would apply to the primary level cooperative societies,Mr. Jani fairly conceded that the said judgment simply considers Section 74-C of the Gujarat Cooperative Societies Act and it does not refer to the authority of a primary level cooperative society to co-opt a member. He also conceded that in accordance with the bye-laws, Managing Committee was entitled to co-opt a member.

14.We asked Mr. Jani that if respondent no.3 had already gone to the cooperative court i.e., the Board of Nominee for redressal of his grievances and injunction had been vacated by the Revisional Tribunal with a finding that the submission of the present petitioner appear to be just, then, how could the respondent no.3 still file affidavit in this Court that the present petitioner did not supply the milk and as such, he was not entitled to be co-opted a member of the Managing Committee. We also asked him that what was the material with the respondent no.3 to make an assertion that the present petitioner did not supply milk for 180 days or he did not supply 700 litres milk. During

the recess period, Mr. Jani sought further instructions from his client and made submission to this Court that the respondent no.3 had no material with him. He submits that he made repeated requests to the primary cooperative society for supply of the details relating to supply of the milk by the petitioner, but the primary cooperative society did not supply the details, therefore, he had to approach the Consumer Forum. When we asked him that if particular material was produced by the present petitioner in the revision before the Revisional Tribunal and the Revisional Tribunal had made an observation that the present petitioner did supply the milk, then, how could such an affidavit be sworn by the respondent no.3, to this, Mr. Jani says that this being the case of the respondent no.3 right from the beginning, such affidavit has been submitted.

15. In the matter of Antakampa Milk Producers' Co-op. Society Ltd. (supra), the question before the Court was that could a specified society co-opt any member to the Managing Committee. Referring to the language of Section 74-C, the High Court observed that in view of the language employed in Section 74-C(3), there was no scope for co-option, but a specified society was obliged to constitute

a Managing Committee through the process of elections. The observations made by the learned Single Judge in the said matter were:-

> "On a plain reading of Sec.74C(3), it transpires that (i) it will have overriding effect on any other bye-law of any such Society, (ii) it also provides that the committee of the management shall be elected by the general body of the Society, (iii) it also provides that all committees authorized by or under the bye-laws may be constituted by electing or appointing persons from amongst the persons who are members of the committee of management."

The learned Judge was not at all referring to primary level cooperative societies and in our opinion, rightly, because, the dispute before the learned Single Judge was in relation to the effect, impact and interpretation of Section 74-C. We are not looking into the correctness or otherwise of the said judgment of the learned Single Judge, but we are simply observing that whether the said judgment can be applied to the facts of the present case.

16.The heading of Section 74C says that it provides provisions for conduct of election of committees and officers of certain societies and term of officers of members of the committee. Now, these societies have been detailed and enumerated in sub-section (1) of Section 74-C. A fair understanding of law would make it clear that provisions of law should be read in reference to a particular thing to which the provision of law refers. A provision of law cannot be applied out of the context, nor can it be mis-applied without looking to the facts. When the provision of law says that election of the members of the societies of the categories mentioned in sub-section (1) shall be subject to the provisions of Chapter XI-A and shall be conducted in the manner laid down by or under that Chapter and thereafter details of the societies are given, then, provisions of Section 74C would apply to those societies only, which have been so specified by sub-section (1) of Section 74C of the Act. It would be illegal to apply these provisions to the primary level cooperative societies.

17.So far as the primary level cooperative societies are concerned, they are entitled to make their own bye-laws under Rule 5 of the Gujarat Cooperative Societies Rules,

1965. According to Rule 5 where a society has been registered, the bye-laws submitted under sub-section (1) of section 8 shall, subject to any modifications approved by the Registrar and adopted at a general meeting having a quorum by a majority of not less than one third of the members present and voting, become the bye-laws of the society. Sub-rule (2) of Rule 5 says that every society shall make bye-laws on the matters mentioned in sub-rule (2). Clause (n) of sub-rule (2) of Rule 5 refers to the constitution and election of the Managing Committee and its powers and duties. From Clause (2), it would clearly appear that primary level cooperative society is entitled to make its own bye-laws relating to the constitution and election of the Managing Committee and its powers and duties. It is not in dispute before us that Adrana Dudh Utpadak Sahkari Mandali Ltd., has made its bye-laws and the said bye-laws have been approved and registered by the Registrar. Bye-law 35 provides that either because of death or for any other reason, if any vacancy is caused in the Managing Committee, then, the said vacancy can be filled by the Managing Committee itself by appointing any member period till the next elections. Bye-law 35 gives un-fettered right to the Managing Committee of the primary

level cooperative society to fill the vacancy and that power even cannot be challenged by any person except on the ground that a particular person could not be so appointed or co-opted for the disqualification suffered by him. The fact and the legal position even otherwise is not disputed by the counsel for the respondents. If that be so, then, co-option of the present petitioner could not be challenged by any person except in accordance with law by initiating proceedings before the competent forum. It is to be noted that in the present case, the respondent no.3 has already initiated proceedings and failed in obtaining an injunction order. At this stage, we must observe that the present petitioner is armed with a prima facie finding recorded by the competent Tribunal/Court that his co-option was in accordance with law.

18. If the co-option dated 5.11.2004 was not required to be approved, then, for what particular reason, this certificate dated 3.6.2005 was filed by the respondent no.3 is still a mystery, which the respondent no.3 is not ready to clarify. We repeatedly asked Mr. Jani representing the respondent no.3 that if the resolution dated 5.11.2004 was not required to be approved, then, why such certificate was obtained and filed before the

Election Officer, the reply which we received was that the certificate was depicting a correct picture and was a correct statement of facts. We asked Mr. Jani that why his client pressed into service the said certificate before the Election Officer to show or convince the Election Officer that co-option dated 5.11.2004 was not approved by the general body and, obtained a finding in his favour, Mr. Jani submitted that this may be a lapse or a bona fide lapse on the part of the respondent no. 3, but there was no intention to mislead the Election Officer of play fraud upon him.

19. It is to be noted that the Election Officer after taking into consideration the said certificate observed that as the petitioner's co-option dated 5.11.2004 was not approved in the general body, his name could not be included in the Voters' List. Even at this stage, we would observe that the Election Officer failed in applying his mind to the effect of the said certificate.

20. Reverting back to Section 74C and the primary cooperative societies, we must observe that if the primary cooperative society is entitled to make its own bye-laws, which become rule of law in case he said bye-laws are approved then any action by the said cooperative society

in accordance with the bye-laws cannot be said to be bad. In the present matter, it is further to be seen that the Election Officer, while upholding the objections, did not look into the judgment of this Court, but had simply relied upon a news clipping. We must immediately condemn the action of the Election Officer. An Election Officer, who also holds the office of the Deputy Collector must know that any newspaper clippings are not admissible in the court of law, because, such news is either a statement made by reporter or a correspondent or by a media person. Such statement is to be taken to be a simple statement of fact in the language of a particular person. A news may or may not be correct therefore while appreciating the legal provisions and the judgments of the courts, one is not to be governed or ruled by news clippings, but must look into the statement given by the Judge himself, that too, in the judgment. It is most unfortunate that the Election Officer, without appreciating that what he was required to do, in his zeal to uphold the objections, acted in a manner which is unknown to law. He firstly referred to the certificate dated 3rd June, 2005 without referring to the bye-laws and secondly, relied upon a news clipping. It is also to be seen from the order passed by

the Election Officer that he was alive to the order dated 20th June, 2005 passed by the Revisional Tribunal vacating the stay, but still wanted to say that the matter was sub-judice. He was not ready to appreciate that the Revisional Tribunal held in favour of the present petitioner and vacated the injunction.

21. When allegations are made by a person, burden to prove the allegations is upon such person. When certain allegations are made and positive evidence in support of such evidence is brought on the record, then, such allegations would be said to be proved. If such allegations are even on the evidence submitted by such complainant are not established, the Court or Tribunal would say that the fact is not proved. In a case where evidence of the complainant establishes the allegations, the other side still has an opportunity to show to the Court or Tribunal that such evidence cannot be relied upon and in such case, it can disprove the facts. In the present case, on basis of simple allegations and pendency of the matter, the Election Officer jumped to the conclusions and proceeded to help the respondent no.3.

22. So far as Mr. Jani's submission that the order of rejection/non-inclusion can be supported on the grounds

mentioned by him is concerned, we must reject the contention immediately. An order is to be supported on the reasons given in the order itself. An order cannot be supported by supplying reasons subsequent to the happening of an event. It is also to be seen that the Election Officer himself did not hold that the petitioner could not be co-opted as a member of the Managing Committee, he having not supplied the milk for 180 days or to the extent of 700 litres milk. If these facts were not taken into consideration by the Election Officer, then, we would not allow anybody to raise an additional ground, specially when the respondent no.3 does not have any material in support of his submission. Respondent No.3 does not have the records, he does not have even the certificate, he simply makes a bald statement which was relied upon by the Member, Board of Nominee, but was disbelieved by the Revisional Tribunal. Under the circumstances, we would not allow the respondent no.3 to raise this question before us.

23. The Election Officer has filed his counter affidavit with vengeance. It appears that he is aggrieved, because, he was asked to file an affidavit. The language employed in the affidavit cannot be said to be moderate or

proper.

24. At number of the places, he has made allegations against the petitioner that the averments made by the petitioner are not wholly true and therefore, he was required to clarify the factual position, statements in the petition are devoid of merits, petition is not required to be entertained and as no fundamental rights of the petitioner are violated by any action or inaction of the respondents, the petition deserves to be dismissed.

25. In para-7, he has stated that the petitioner is not an elected member of the Managing Committee, but he is co-opted by the Society and he was nominated by the Society as voter and as per the legal settled principle, the co-opted members are not entitled to vote therefore the petitioner's name has been excluded from the final Voters' List. We asked Ms.Sheth to clarify the statements made by the deponent in para-7. After taking proper instructions from the Election Officer, it is submitted that these observations are made on basis of a paper clipping. We do not know how should we express ourselves to the Election Officer, who without referring to law or without going through the judgment of this Court simply relies upon the paper clipping and starts asserting that his action is

justified.

26.In para-8, the deponent has sated that he had received the objections, name of the petitioner could not be included in the final Voters' List as the petitioner was disqualified as a voter since he lost election for the committee member and on the date of the declaration of the final voters list he was not a committee member of the society and therefore his name has been excluded from the final Voters' List.

27.The petitioner has asserted that in the meeting dated 24.5.2005, he has been elected as a member of the Managing Committee, the fact has not been disputed by the respondent no.3, who happens to be a primary member of the said primary level cooperative society. We asked Ms. Sheth to seek instructions from the Election Officer that on what basis, he had made such statement on oath. Referring to the letter dated 3.6.2005, Ms. Sheth submitted that on a fair understanding of the said letter-cum-certificate, the Election Officer thought that the petitioner lost in the general body elections and as such, he lost all his rights. We asked Ms.Sheth and the Election Officer to read even a single word about the general body election to satisfy us, but instead of reading the said letter, it

was repeatedly submitted to us that the Election Officer developed such understanding. The certificate dated 3rd June, 2005 nowhere says that the petitioner contested the election to the office of the Managing Committee and he lost the elections in the general body. The certificate dated 3.6.2005 simply says that the resolution of the Managing Committee taken on 5.11.2004 was not approved by the general body. We have already observed that the certificate is in the twisted language. It wants to convey half truth and the half truth, in fact, was leading to perversity. We have already observed that the resolution dated 5.11.2004 was not required to be approved in the general body meeting and the fact is not disputed by the respondent no.3 If that be so, there was no reason for the respondent no.3 to file such certificate before the Election Officer. It appears that the respondent on.3, to have illegal mileage or illegal benefits, with the help and assistance of the Election Officer, submitted such certificate and secured an order in his favour. The Election Officer did not make any inquiries from anyone. Even after filing of this writ application, it does not appear from the affidavit of the Election Officer that he made any inquiry either from the petitioner or from the

respondent on.3 or from the primary level cooperative society. When a positive statement was being made by the petitioner that he was elected as a member of the Managing Committee in the general body meeting dated 24.5.2005, then, such statement, at least, should have worked as an eye opener for the Election Officer, but unfortunately, keeping blind-fold, he still wanted to say that the petitioner lost elections in the general body.This statement is patently false, it shows absolute recklessness and carelessness on the part of the Election Officer. Where an Election Officer is appointed by the State or by a competent authority pious work is assigned to him, it is not expected of him that he would be bias or prejudiced. It is not expected of him that he would help somebody and to help him, may go to any extent and even would create false records or make false statements on oath. It is expected of an Election Officer that he would be just and fair and would discharge his duties in accordance with law and would believe in fair play. Unfortunately, in the present case, the Election Officer is not ready and willing to rise to the occasion and even at this stage wants this Court to believe that what he did was absolutely right and justified.

28. While we were in the process of dictating the judgment, Ms. Sheth got up and submitted that the statement made in para-8 of the affidavit, in fact, are not to be found in the notes of the Election Officer. She submits that the affidavit was drafted by somebody else and the Election Officer has simply affixed his signature to it. We are not ready to accept that a man of Deputy Collector's level would affix his signature to the affidavit without reading the contents of the same. It is yet to be seen that the matter is being heard right from 11.00 A.M., and till by this time i.e. 4.30 P.M., the Election Officer did not say that the statements made in para-8 of his counter affidavit are based on some wrong information or are based on incorrect information supplied to him.

29. The statements made in para-8 are on oath, are in positive terms and assert the fact that the name of the petitioner could not be included in the list since he had lost election for the committee member and on the date of the declaration of the final Voters' List, he was not a committee member. Such statement is false and false to the knowledge of the Election Officer. It is also to be seen that the Election Officer, in his affidavit, nowhere states that what inquiries were made by him. It is not

even the case of the respondent no.3 at any time that the petitioner lost the election in the general body. The submission only was that the resolution dated 5.11.2004 was no approved in the general body. We do not know from where the Election Officer could collect these facts, specially when he did not make any inquiry either from the petitioner or from the respondent or from the primary level cooperative society. If the deponent did not make any inquiry from anybody, then, it is to be presumed that he concocted certain facts, manufactured the foundation and supplied it to the High Court in the form of an affidavit to support his own order which is even otherwise patently illegal.

30. In para-9, the Election Officer has observed that after the vacancy had fallen, the Managing Committee passed a resolution and co-opted the petitioner as member of the Managing Committee, but in view of the decisions of the High Court, unreported and reported, the co-opted members are not entitled to cast their votes in an election, therefore, his name has been excluded from the final Voters' List. This statement has been made to make us believe that the Election Officer has read the reported or unreported judgments delivered by this Court or some

Court. Unfortunately, the Election Officer did not go through any judgment. From the order passed by him, it would clearly appear that he was simply relying upon the paper clippings. If an act was not done by him, then, he should not have stated before us that something was done by him. The judgment of this Court to which we have referred earlier, nowhere talks about the primary level cooperative society.

31. He has also submitted in para-9 that the said resolution is also challenged before the Co-operative Tribunal and the resolution is not challenged before the Board of Nominees at Mehsana in Lavad Suit No. 289 of 2005, wherein the Hon'ble Board of Nominees has refused to include the name of the petitioner and implement the resolution no. 3 passed by the Adrana Dudh Utpadak Sahkari Mandali Ltd., **and therefore** his name has been excluded from the Voters' List. This statement made by the Election Officer is again a false statement. According to him, the resolution has not been challenged before the Board of Nominees. The Board of Nominees did say that the petitioner could not be co-opted, but unfortunately, the Election Officer, despite being alive to the revisional order dated 22.6.2005, does not refer to the revisional

order and still wants to stick to the order dated 14.6.2005 which has been set aside. In the judicial hierarchy, when an order is set aside by the Higher Court, then, order passed by the subordinate Court, Tribunal or Authority becomes nonest. It does not remain in existence. Contrary to revisional order, if anybody relies upon the order which has already been set aside, then, such officer or a person commits a contempt of the lawful authority of the authority which had set aside the order. In the present matter, undisputedly, rather indisputably, the order passed by the subordinate court i.e., the Board of Nominees is not in existence. The injunction order has been vacated and as a consequence of which, every finding recorded by the said Board of Nominees stands nullified, it does not exist. It is most unfortunate that despite the revisional order, the Election Officer has cheeks to say that because the Board of Nominee has refused to include the name of the petitioner and implement the resolution no. 3, the petitioner's name could not be included in the Voters' List.

32. In para-10, the Election Officer has stated that the Tribunal allowed the revision vide order dated 28.6.2005 (20.6.2005) whereby the Tribunal has directed the learned

Board of Nominees to dispose of the said suit on merits within three months, but as the suit is still pending and Court had not set aside the issue finally relating to the petitioner being included as co-opted member in the society, therefore, the petitioner's name has been excluded from the final Voters' List. We are shocked, nay astonished. We are at a loss to understand the logic behind this statement. It is trite law that right of a party is not adversely affected unless the challenge made against the said right culminates into a judgment, finding or award against him under the hands of the competent court, authority or tribunal. In the present case, the respondent no.3 has submitted that Lavad Suit No. 289 of 2005, could secure an injunction, injunction was later on vacated and the matter was remitted to the Board of Nominees for its disposal in accordance with law within a period of three months. If everything is taken to be correct and every latitude is given to the respondent no.3, the legal position would emerge thus: some matter challenging the co-option of the present petitioner is pending consideration before the competent authority. In our opinion,, pendency of such matter would not adversely affect the rights of the petitioner. In the

present case, though, we have already observed that co-option could not be faulted, but assuming that the matter is yet to be decided by the Board of Nominees, then, only from the date of the judgment, the petitioner's right would be adversely affected and only then, resolution dated 5.11.2004 would stand nullified. At this stage, it cannot be presumed as to what would be the final outcome in the said Lavad Suit. Submission of the Election Officer in para-10 that the suit is not finally decided, therefore, the issue relating to resolution no. 3 based on which the petitioner is claiming as co-opted member of the Managing Committee, is yet to be decided. We do not understand the logic behind this submission. The Managing Committee has co-opted the petitioner, law nowhere puts fetters on the powers of the Managing Committee.

33. In para-12, the Election Officer has stated that in the Bye-law Rule 28(d) (it was submitted during course of the arguments that he is referring to Bye-law No.28 of the respondent no.2), the preliminary qualification of the voters is defined wherein the co-opted member is not mentioned as a qualified member to vote and therefore in view of that the petitioner's name has been excluded. It appears that the Election Officer is becoming wiser after

the event. He did not refer to Bye-law 28(d) in his order. In his order, he had simply observed that the petitioner's co-option was not approved by the general body, the matter is still pending consideration before the competent court and co-opted member is not entitled to take part in the election. The bye-law 28(d) simply says that every Milk Producer Cooperative Society, affiliated with the Union shall refer one name of member of the Managing committee to take part in the general body meeting of the respondent no.2. True it is that the bye-law 28(d) does not refer to co-opted member, but when the law does not make any distinction amongst elected, nominated, appointed or co-opted members, so far as the primary co-operative societies are concerned, then, there is no reason to read so in Bye-law 28(d). It is to be seen that Section 74-B which refers to the reservation of seats on committees of certain societies for Scheduled Castes and Tribes and small and marginal farmers, clarifies that two seats shall be reserved, one for persons belonging to the Scheduled Caste or Scheduled Tribe or to both the Scheduled Castes and Scheduled Tribes... and one for the persons who are small farmers and marginal farmers. From sub-section (2) of Section 74B,

it would clearly appear that appointment, nomination or co-option are not absolutely foreign to the Cooperative Societies Act, nor are forbidden under the Cooperative Societies Act. It is nowhere referred in any of the provisions of law that the candidates elected on reserved seats or the persons who have been co-opted or appointed to fill a vacancy would be treated as second class members in the Managing Committee. If the law is plain and simple, it must be understood to be so. Interpretation would be needed where there is scope for it. When the law simply says that `any member of the Managing Committee', then there is no scope to so read or hold that it simply refers to elected member. If the law does not make any distinction amongst the members interse, then, nobody can carve out such a distinction. In the present matter, the Election Officer has tried his best to mislead this Court even by filing such wrong, baseless and factually false affidavit. Rule 28(d) has nothing to do with the elections of the specified society.

34. Mr. Jani and Ms. Sheth, as a last resort, submitted that as the election process has commenced and the petitioner would have a right to challenge the outcome of the election in a duly constituted election petition, this

Court should not interfere in the matter at this stage. Ordinarily and under the ordinary circumstances, specially under normal circumstances, where the Election Officer had not made false statement, had not violated every provision of law, where private respondent had not taken everybody for a ride by not making false statement, we would not have interfered with the matter. In the abnormal circumstances, abnormal remedies are to be provided. The petitioner's name has not been included in the Voters' List on the grounds, which even according to the counsel for the respondents, cannot be accepted. **Ms.Sheth, so also Mr. Jani agreed to the legal position that the order passed by the Election Officer lacks in particulars, is based on mis-interpretation of law and cannot be justified and if that be so, should we allow the illegality to perpetuate,** should we allow the petitioner's right to be suppressed till final disposal of the election, should we compel him to file an election petition and undergo the ordeal of a long-drawn trial for years together, then secure an order after satisfying the Election Tribunal that non-inclusion of his name in the Voters' List had adversely affected the election. In a given case, when an illegality can be nibbed in the bud,

it is not necessary that it should be allowed to grow in a huge and great tree and then employ number of the persons to demolish or cut the tree i.e., the illegality. The authority given to the High Court under Article 226 is to be used as a sword to strike against the illegality the moment it is found. The High Court is not required to use its powers of Article 226 as a sheath. The sword of justice is for striking on the illegalities. In case like the present, if we do not interfere, in our considered opinion, we would be committing illegality. Under the circumstances, we hereby quash the order dated 22nd June, 20, 2005.

35. By interim order, we had allowed the petitioner to submit his nomination and had issued injunction against the Election Officer not to reject his nomination on the ground which is under challenge before us. Further action in the election is to be taken on 19th July, 2005. We hold that the petitioner's nomination cannot be rejected on this ground. We further direct the Election Officer to amend the Voters' List and include the name of the petitioner in the Voters' List.

36. The petition is allowed with costs. Rule is made absolute. The State shall pay Rs. 10,000/- (Rupees Ten

Thousand only) to the petitioner, which may be recovered from the person who has committed illegalities. The respondent no.3 shall also pay a sum of Rs. 5,000/- (Rupees Five Thousand only) as costs to the petitioner.

[R.S. GARG, J.]

[RAVI R. TRIPATHI, J.]

pirzada/-